

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**FRED NEKOUÉE, Individually,**

**Plaintiff,**

**v.**

**INDIAN CREEK SHOPPING CENTER,  
L.L.C., a Kansas Limited Liability Company;  
and DENNY’S, INC., a Florida Corporation,**

**Defendants.**

**Case No. 2:18-CV-02238-JAR-JPO**

**MEMORANDUM AND ORDER**

Plaintiff Fred Nekouee brings this action against Defendants Indian Creek Shopping Center, L.L.C. (“Indian Creek”) and Denny’s, Inc., seeking declaratory and injunctive relief for Defendants’ alleged violation of Title III of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12181, *et seq.* Now pending before the Court are Indian Creek’s Motion to Dismiss Plaintiff’s First Amended Complaint (Doc. 15) and Plaintiff’s Motion for Leave to File Second Amended Complaint and Memorandum in Support (Doc. 18).<sup>1</sup>

On June 19, 2018, Indian Creek filed a motion to dismiss Plaintiff’s Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. However, Indian Creek filed no accompanying memorandum in support of its motion, and United States Magistrate Judge

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<sup>1</sup> On August 14, 2018, Plaintiff filed a pleading titled “Motion for Leave to File Revised Second Amended Complaint and Motion for Stay of Deadline to Answer or Otherwise Respond and Memorandum in Support.” Doc. 22. In this motion, Plaintiff sought leave to file a revised version of his proposed Second Amended Complaint to substitute Den-Tex Central, Inc. as a defendant in place of Denny’s, Inc. On August 17, 2018, Judge O’Hara granted Plaintiff’s motion, allowing Plaintiff “leave to file a revised version of the proposed second amended attached to [his] motion for leave to amend complaint. To be clear, plaintiff is granted leave only to file a revised version of an exhibit attached to a pending motion (i.e., the motion for leave to amend, ECF No. 18, remains pending).” Doc. 23.

James P. O'Hara therefore denied the motion for failure to comply with D. Kan. 7.4(a).<sup>2</sup> In his order, Judge O'Hara also noted that Plaintiff had filed a First Amended Complaint on June 20, 2018, which might moot Indian Creek's motion to dismiss.

On July 19, 2018, Indian Creek filed a second motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and a supporting memorandum, arguing that Plaintiff lacks standing to bring his claims and that this Court therefore lacks subject matter jurisdiction. On July 23, 2018, Plaintiff filed a motion seeking leave to file a Second Amended Complaint. Plaintiff argues that his proposed Second Amended Complaint addresses Indian Creek's standing arguments by adding allegations concerning a return visit he made to the Indian Creek Shopping Center in July 2018.<sup>3</sup>

Because Plaintiff has already amended his complaint once as a matter of course, he now seeks leave of court to amend again under Fed. R. Civ. P. 15(a). Indian Creek failed to oppose Plaintiff's motion for leave to amend, and the time for doing so has long since passed.<sup>4</sup> Under D. Kan. Rule 7.4,

[a]bsent a showing of excusable neglect, a party or attorney who fails to file a responsive brief or memorandum within the time specified in D. Kan. Rule 6.1(d) waives the right to later file such brief or memorandum. If a responsive brief or memorandum is not filed within the Rule 6.1(d) time requirements, the court will consider and decide the motion as an uncontested motion. Ordinarily, the court will grant the motion without further notice.

Thus, as a result of Indian Creek's failure to respond, and pursuant to Fed. R. Civ. P. 15(a)(2), the Court grants Plaintiff's motion for leave to amend.

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<sup>2</sup> Doc. 13. D. Kan. Rule 7.1 provides that a brief or memorandum must accompany all motions except under certain limited circumstances, none of which would have applied to Indian Creek's initial motion to dismiss. D. Kan. Rule 7.4(a) provides that "[t]he Court may summarily deny a motion not accompanied by a required brief or memorandum."

<sup>3</sup> See Doc. 18 at 1–2.

<sup>4</sup> Under D. Kan. Rule 6.1(d)(1), Indian Creek's deadline to oppose Plaintiff's motion to amend was August 6, 2018.

**IT IS THEREFORE ORDERED BY THE COURT** that Plaintiff Fred Nekouee's Motion for Leave to File Second Amended Complaint and Memorandum in Support (Doc. 18) is **granted**. Plaintiff shall file the Second Amended Complaint attached as Exhibit 1 to Doc. 22 no later than **December 14, 2018**. Defendant Indian Creek Shopping Center, L.L.C.'s Motion to Dismiss Plaintiff's First Amended Complaint (Doc. 15) is **denied as moot**, without prejudice.

**IT IS SO ORDERED.**

Dated: December 12, 2018

S/ Julie A. Robinson  
JULIE A. ROBINSON  
CHIEF UNITED STATES DISTRICT JUDGE